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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 713

JOSE CASES VELAZQUEZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH R. FRANCIS,
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No. 713

JOSE CASES VELAZQUEZ,
Petitioner and Appellant below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a criminal action brought in the District Court of the United States for Puerto Rico by the United States of America, respondent herein, against José Cases Velázquez, petitioner herein, charging, in four counts, a violation of sections 1, 2e and 2f of the Federal Firearms Act, 52 Stat.

1250, 15 U. S. C. A. 901-909, by transporting and receiving a firearm and ammunition after having been convicted of a crime of violence. (Transcript of Record, pp. 1-4). Trial was by jury and a verdict was rendered against the accused, petitioner herein, finding him guilty on all four counts (Transcript of Record, p. 6). Accused, petitioner herein, was sentenced to three years imprisonment on the first count, three years on the second, five years on the third and five years on the fourth, the first two sentences to run consecutively and the last two concurrently but consecutive to the first two. The last two sentences were suspended (Transcript of Record, pp. 7-8). An appeal from said verdict and judgment was taken by the accused, petitioner herein, to the Circuit Court of Appeals for the First Circuit (Transcript of Record, pp. 8-11), which affirmed the judgment of the District Court of the United States for Puerto Rico (Judgment of the Circuit Court of Appeals, Transcript of Record, p. —). The principal questions involved in said appeal were:

1. The court erred in overruling defendant's motion to postpone the oral argument on the demurrer to the indictment.

2. The court erred in overruling defendant's demurrer to the indictment.

3. The court erred in overruling defendant's motion to be allowed time to file a motion for a bill of particulars.

4. The court erred in overruling defendant's motion for a bill of particulars.

5. The court erred in overruling defendant's motion to postpone trial.

6. The court erred in refusing to permit defendant to ask jurors, during their examination, whether they had served on juries in the Insular courts.

7. The court erred in refusing to permit defendant to investigate by questions to jurors, during their examination, whether they had any personal affairs pending which, because of their nature, might worry them so much that it would prevent them from dedicating their full attention to the case to be tried.

8. The court erred in limiting defendant, in his inquiries into the mental state of the jurors, to asking the question whether the juror was in a position to give the case a fair and impartial trial.

9. The court erred, over objection and exceptions of defendant's counsel, in refusing to permit the examination of defense witness, Fernando Gallardo Díaz, as to whether, as Insular District Attorney, he had prosecuted or arrested defendant or anybody else for the shooting affair during the course of which defendant was alleged to have been carrying a revolver.

10. The court erred in refusing defendant's counsel sufficient time to sum up the case to the jury.

11. The verdict was contrary to the law and facts in that:

(a) The only previous conviction shown by the evidence was one for aggravated assault and battery under Puerto Rican law, which is not one of the crimes listed in the Federal statute as crimes of violence.

(b) As to the first count of the indictment, for receiving the ammunition, the evidence shows that the reception was the start, and part of the transportation alleged in the second count; except for the invalid presumption created by law, it does not show that the ammunition had been shipped or transported in interstate or foreign commerce; and, it does not show that the ammunition was of the kind whose reception is prohibited by the statute.

(c) As to the second count of the indictment for transporting the ammunition, the evidence does not

show transportation from one jurisdiction to another in interstate or foreign commerce and does not show that it was the kind of ammunition whose transportation is prohibited by the statute.

(d) As to the third count of the indictment, for receiving the revolver, the evidence, except for the invalid presumption created by law, does not show that the revolver was shipped or received in interstate or foreign commerce, showing mere possession by defendant.

(e) As to the fourth count in the indictment, for transporting the revolver, the evidence shows possession by defendant at a designated place, on the date alleged in the indictment. As to other transportations, there is a fatal variance with the date and place alleged in the indictment. Except for the invalid presumption created by law, there is no evidence to show transportation from one jurisdiction to another in interstate commerce.

(f) The evidence does not show that the acts of transportation or reception alleged in the four counts of the indictment took place within the jurisdiction of this court or within the jurisdiction of the United States.

12. The court erred in overruling defendant's motion in arrest of judgment.

And by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

These questions were decided by said Circuit Court of Appeals for the First Circuit and materially affected the determination of said appeal (Opinion of the Circuit Court, Transcript of Record, p. 40).

II.

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals holding, (a) that the Federal Firearms Act is valid, (b) that the decision in the case of *United States* v. *Miller,* 307 U. S. 174, did not mean to formulate a general rule and that, if it did, said decision is invalid, and (c) that a conviction for aggravated assault and battery under Puerto Rican law is a crime of violence under the meaning of the Federal Firearms Act, involves an important question of Federal law which has not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals holding that the Federal Firearms Act is not ex post facto even when the previous conviction for a crime of violence happened before the law was approved, is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court, especially the decisions in the cases of *Cummings* v. *Missouri,* 4 Wall. 277, *Ex Parte Garland,* 4 Wall. 377, and *Pierce* v. *Carskadon,* 16 Wall. 234. Also, the decision holding that the limitations imposed by the Second Amendment to the Constitution are not applicable to .38 caliber revolvers is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court, particularly the decision in the case of *United States* v. *Miller,* 307 U. S. 174.

3. The decision of the Circuit Court of Appeals holding (a) that the Federal Firearms Act is not an ex post facto law, (b) that the Federal Firearms Act does not deny equal protection of laws, (c) that the Federal Firearms Act does not create an unreasonable presumption of guilt, (d) that the Federal Firearms Act is not an undue extension of the power to regulate interstate commerce, (e) that the limita-

tions of the Second Amendment to the Constitution do not apply in this particular case and (f) that the verdict was not found on insufficient evidence, involves a decision of constitutional questions which have not been, but should be, decided by this Court.

4. The decision of the Circuit Court of Appeals, holding that a conviction under Puerto Rican law for the crime of aggravated assault and battery is a conviction for the crime of assault with intent to commit a battery and a conviction for the crime of assault and battery, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

5. The decision of the Circuit Court of Appeals holding, (a) that a conviction for an assault and battery is a conviction for an assault with intent to commit a battery and a conviction for an assault and battery, and (b) that there was no need of additional evidence to prove the character of the ammunition supposed to have been transported by the accused, is an erroneous decision on an important question of general law which should be reviewed by this Court.

III.

Jurisdiction.

1. The date of the judgment to be reviewed is November 27, 1942 (Transcript of Record, p. 52).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. C. A. § 347 (c).

3. The Federal statute whose validity is involved is the Federal Firearms Act, especially sections 1, and 2(e) and (f), c. 850, § 1 and 2, 52 Stat. 1250. Section 2(e) of this act makes it a crime for a person who has been previously convicted of a crime of violence, to transport or cause to be

transported in interstate commerce any firearm or ammunition; section 2(f) makes it a crime for a person who has been previously convicted of a crime of violence, to receive any firearm or ammunition which has been shipped in interstate commerce; section 1 (1) defines interstate commerce in the usual way, but adds that commerce within any territory or possession or the District of Columbia shall be considered interstate commerce; section 1 (2) defines a firearm as any weapon designed to expel a projectile by the action of an explosive; section 1 (1) defines a crime of violence as: murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year; and section 1 (8) defines ammunition as including only pistol or revolver ammunition and not including shotgun shells, rifle ammunition or any .22 caliber rimfire ammunition.

4. This is a criminal case in which petitioner herein was convicted by the District Court of the United States for Puerto Rico, appealed to the Circuit Court of Appeals for the First Circuit and the Circuit Court affirmed the judgment of the District Court.

IV.

Questions Presented.

1. Validity of the Federal Firearms Act. It is submitted that this act is, at least partially, invalid and unconstitutional because:

(a) It is ex post facto when applied to persons whose conviction for a crime of violence was previous to the adoption of the law. By this law, the right of a person to keep and bear arms is taken away from him because of a crime committed before the adoption of the law.

(b) It is a limitation of the right to keep and bear arms, prohibited by the Second Amendment to the Federal Constitution.

(c) It is an undue extension of the interstate commerce clause of the Federal Constitution in that Congress has arbitrarily classified as interstate commerce, commerce completely within the local jurisdiction of a territory or possession and seeks to control goods which have lost their interstate character.

(d) It creates an invalid presumption of transportation or reception in interstate commerce from the mere possession of a firearm or ammunition.

(e) If interpreted as it was interpreted by the Circuit Court, it is discriminatory in that of two persons, both of whom have been convicted of a crime of violence, one may not be punished, while the other one is, because in one of the jurisdictions the crime committed was not punishable by imprisonment for more than one year.

2. Sufficiency of the indictment. It is submitted that the indictment was insufficient because:

(a) The previous conviction alleged is not a crime of violence under the meaning of the Federal Firearms Act.

(b) The first and third counts do not allege, sufficiently, reception of firearms and ammunition in interstate commerce.

(c) The second and fourth counts do not allege, sufficiently, transportation of firearms or ammunition in interstate commerce.

3. Sufficiency of the evidence as to the first two counts. It is respectfully submitted that:

(a) There was no proof that the ammunition received or transported was of the prohibited kind.

(b) There was, as to the ammunition, only one transaction shown.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the First Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 3756, José Cases Veláquez, appellant v. United States of America, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court, and for such further relief as to this court may seem proper.

San Juan, Puerto Rico, December 25, 1942.

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EDGAR S. BELAVAL,
Attorneys for the Petitioner.